

December 23, 1997

**OFFICE OF THE HEARING EXAMINER**  
**KING COUNTY, WASHINGTON**

700 Central Building  
810 Third Avenue  
Seattle, Washington 98104  
Telephone (206) 296-4660  
Facsimile (206) 296-1654

**REPORT AND DECISION:**

- A. APPEAL FROM SEPA THRESHOLD DETERMINATION;**
- B. CONDITIONAL USE PERMIT DECISION APPEAL**

**SUBJECT:** King County Department of Development and Environmental Services  
File No. **L97AC005**

**RING HILL TELECOMMUNICATIONS FACILITY**

Conditional Use Permit Decision Appeal  
and  
SEPA Threshold Determination Appeal

**Location:** Duvall Landfill, 22905 Old Woodinville-Duvall Road

**Applicant:** King County Emergency Management Division, *represented by:*  
**Kevin Kearns**, Division Manager  
7300 Perimeter Road South, #128, Seattle, WA 98108-3848  
Telephone: (206) 296-8749 Facsimile: (206) 205-8133

**Appellants:** Saybrook Homeowner's Association, *represented by:*  
**David S. Mann**, Bricklin & Gendler  
1424 Fourth Avenue, #1015, Seattle, WA 98101  
Telephone: (206) 621-8868 Facsimile: (206) 621-0512  
and  
**Daniel J./Karen Towslee**, *pro se*  
16215 Saybrook Drive NE, Woodinville, WA 98072  
Telephone: (425) 844-2071 Facsimile: (425) 788-6874

**Department:** Department of Development and Environmental Services  
Land Use Services Division, SEPA Section  
*represented by:* **Angelica Velasquez**  
Telephone: (206) 296-7136 Facsimile: (206) 296-7051

**SUMMARY OF RECOMMENDATIONS:**

Department's Preliminary:	Deny the appeals
Department's Final:	Deny the appeals
Examiner Decision:	Saybrook appeal denied Towslee appeal dismissed

## PRELIMINARY MATTERS:

Application submitted:	January 31, 1997
Determination of Non-Significance:	July 1, 1997
Saybrook Homeowner's Association appeal filed:	July 15, 1997
Daniel and Karen Towslee appeal filed:	July 22, 1997

## EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	September 23, 1997
Motion Hearing:	October 9, 1997
Hearing Opened:	December 11, 1997
Hearing Closed:	December 11, 1997

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

## ISSUES ADDRESSED:

- Land use compatibility
- Noise
- Drainage
- Open space

**FINDINGS, CONCLUSIONS & DECISION:** Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

## 1. General Information:

Applicant: King County Emergency Management Division, *represented by:*  
**Kevin Kearns**, Division Manager  
7300 Perimeter Road South, #128, Seattle, WA 98108-3848

Appellants: Saybrook Homeowner's Association, *represented by:*  
**David S. Mann**, Bricklin & Gendler  
1424 Fourth Avenue, #1015, Seattle, WA 98101  
and  
**Daniel J./Karen Towslee**, *pro se*  
16215 Saybrook Drive NE, Woodinville, WA 98072

Location:	Duvall Landfill, 22905 Old Woodinville-Duvall Road
STR:	NE/SE 09-26-06
Zoning:	RA 5-P
Drainage Sub-basin:	Big Bear Creek
Community Plan:	Bear Creek

2. The Proposal. King County Emergency Management Division (the “Applicant”) proposes to construct a guyed 300-foot steel communications tower with support facilities, as a part of the King County emergency management 800 megahertz emergency radio system. The project includes the installation of two microwave dishes, a 6-foot diameter dish to be installed at the 150-foot level, and an 8-foot diameter dish to be installed at the 140-foot level. The tower also is proposed to include approximately 11 omni-directional antennae. In addition, there will be a one-story tall equipment shelter covering approximately 1,270 square feet. These facilities will be located on a 5,330 square foot (73 feet by 73 feet) parcel surrounded by a 6-foot high security fence. The proposal is located in a possible erosion hazard area. Consequently, Bear Creek Community Plan Policies P-4 and P-10, regarding drainage controls during construction and protection of environmentally sensitive areas, will apply. The project is also subject to regulation by the Federal Aviation Administration, which has required that the facility be equipped with a white flashing strobe during daylight hours and a red light during night hours. The project is also under the jurisdiction of the Federal Communications Commission (FCC), which has preempted any local regulation of non-ionizing electromagnetic radiation (NIER).

3. County Decisions. The King County Department of Development and Environmental Services (hereinafter, the “Department” or “DDES”) issued a threshold determination of nonsignificance (DNS) regarding the proposed development on July 1, 1997. Subsequently, on July 8, 1997, the Department issued its decision granting a conditional use permit (CUP) subject to the following conditions:

- A. Development is required to be in accordance with CUP exhibit D-6, the Applicant’s site plan, which fits the location and configuration of the proposed tower.
- B. Landscaping is required to be as shown on page L-1 of the Applicant’s plans (exhibit no. 6). In addition, the Department requires a watering plan and a landscape bond to be submitted for review and approval.
- C. The tower shall remain an anodized steel gray to blend with the sky.
- D. The facility shall comply with KCC Title 12, the King County noise code.
- E. The Applicant shall obtain all necessary building permits for construction of the tower and associated facilities on the subject property.
- F. Fire code access compliance is required and an automated fire suppression system for the building must be provided.
- G. The Applicant shall submit drainage plans if the new impervious surface of the proposal exceeds 5,000 square feet.<sup>1</sup>

4. The Parties. Both the DNS and the CUP are appealed by two parties: Daniel J. and Karen Towslee, *pro se*; and, Saybrook Homeowners Association (hereinafter, “Saybrook”), *represented by* David S. Mann. Daniel J. and Karen Towslee did not appear, a matter which is addressed in conclusion 1 and paragraph A of the Examiner’s decision and order on page 6 of this report.

The Saybrook appeal comes in two parts: An Appeal of the DNS and the CUP, both based upon certain substantive issues; and, a motion to remand for failure to comply with RCW 43.21C.030(2)(e) (SEPA) regarding whether the Applicant should have considered alternatives to the proposed

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<sup>1</sup> Typically, impervious surface includes driveway access, which is improved to the width and durability standards which are satisfactory to the King County Fire Marshall.

development. The criteria to be applied in this appeal review are set forth in finding 3, following. The substantive environmental issues addressed in the CUP/DNS appeal will be addressed in findings 6 through 10, below. Finally, the findings relevant to the Appellant's *motion to remand* are set out on page 6 of this report as finding no. 12. These findings are reviewed in conclusion no. 2 on pages 6 and 7.

5. Criteria for Appeal Review. These criteria and standards will be applied in this review:

A. SEPA. Section D of the Division's October 24, 1997 preliminary report to the King County Hearing Examiner (exhibit no. 2) cites the scope and standard of review to be considered by the Examiner. The Division's summary is correct and will be used here. In addition, the following review standards apply:

- WAC 197-11-350(1), -330(1)(c), and -660(1)(3). Each authorize the lead agency (in this case, the Environmental Division), when making threshold determinations, to consider mitigating measures that the agency or applicant will implement or mitigating measures which other agencies (whether local, state or federal) would require and enforce for mitigation of an identified significant impact.
- RCW 43.21C.075(3)(d) and KCC 20.44.120 each require that the decision of the Responsible Official shall be entitled to "substantial weight". Having reviewed this "substantial weight" rule, the Washington Supreme Court in Norway Hill Preservation Association v. King County, 87 Wn 2d 267 (1976), determined that the standard of review of any agency "negative threshold determination" is whether the action is "clearly erroneous". Consequently, the administrative decision should be modified or reversed if it is :

... clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order.

B. Conditional Use. KCC 21A.44.040 establishes King County criteria for a conditional use permit. It states that a conditional use permit shall be granted by the County only if the Applicant demonstrates the following:

- The conditional use is designed in a manner which is compatible with the character and appearance of an existing, or proposed development in the vicinity of the subject property;
- The location, size and height of buildings, structures, walls and fences, and screening vegetation for the conditional use shall not hinder neighborhood circulation or discourage the permitted development or use of neighboring properties;
- The conditional use is designed in a manner that is compatible with the physical characteristics of the subject property;
- Requested modifications to standards are limited to those which will mitigate impacts in, and a manner equal to or greater than, the standards of this title;
- The conditional use is not in conflict with the health and safety of the community;

- The conditional use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood; and,
- The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts on such facilities.

6. Noise. The Appellants expressed concerns regarding noise emanating from the pertinent building as well as from wind vibration of the tower and guyed wires. The guyed wires will be weighted in order to minimize or eliminate harmonics. Consequently, the Applicant expects the wind noise emanating from the proposed development will be indecipherable from the wind noise emanating from the numerous tall evergreen trees in the vicinity. The hearing record contains no evidence which rebuts this contention. In addition, the Applicant asserts that the operating equipment within the building will not be noticeable at the property boundaries because the building will be insulated, windowless, and will be constructed of concrete block. Again, these assertions are unrebutted in the record.

7. Drainage. By examining topographic maps of the site and vicinity, the Department determined that the proposed development will not discharge drainage toward Saybrook. However, due to possible erodible soils in the vicinity, special Bear Creek Community Plan drainage controls will be applied. In addition, on-site retention may be required if the combined impervious surfaces, including the tower pad, pertinent facility building, and access drive exceed 5,000 square feet. No building permit will be issued prior to review consistent with King County Surface Water Management Division requirements. The hearing record contains no identified fault with those requirements.

8. Public Open Space. The Appellants also express concern regarding the loss of “public open space.” This argument is based upon the fact that the proposed development comprises a small portion of a 70+ acre former solid waste facility owned and managed by King County Solid Waste Management Division. The Applicant responds that this property has never been committed to any public open space program. It is a recovering landfill and no more than that, argues the Applicant.

9. Neighborhood/Land Use Compatibility. The Saybrook development is comprised of lots of approximately 35,000 square feet. The Appellants regard this land use density as “rural” in character. The County Comprehensive Plan, however, regards densities in this lot size range as “urban”.

As noted above, KCC 21A.44.040.A requires the Applicant to demonstrate that the project is “designed in a manner which is compatible with the character and appearance of an existing or proposed development in the vicinity of the subject property; . . .” The Department administratively concluded that the proposed development complied with this standard. The responsible official concluded, *inter alia*:

Because the proposed tower is to be located among tall evergreen and deciduous trees, the facility will be well screened from the north and west. However, the lattice tower will be visible from the south. Installing landscaping along the south property line will reduce the visibility of the facility from the residences to the south. The proposed landscape plan is sufficient to achieve this.

A large portion of the Saybrook appeal focuses on this conclusion, arguing that the landscaping along the south property line will not reduce visibility sufficiently to achieve compatibility for Saybrook, particularly those Saybrook members who reside along the street which extends southward from the proposed development.

A large existing pale green reservoir is located adjacent to the proposed communication tower's site. It provides (urban) context for the site, and, in addition, screens the site somewhat. It, too, is screened with a berm and landscaping.

10. Radio Emissions. In the Telecommunications Act of 1996, dated February 8, 1996, the United States Congress pre-empted all states and local governments and instrumentalities from regulating the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions. Therefore, King County no longer exercises authority in this area. The Federal Communications Commission has promulgated radio frequency emissions standards and regulations which it applies to applicants. The King County Division of Emergency Management can not develop and operate this proposed facility without FCC approval.

11. Department Report Adopted. Except as noted above, the facts and analysis contained in the responsible officials CUP report and decision dated July 8, 1997 (exhibit no. 23) is adopted and incorporated in this Examiner's report.

12. Alternatives. Applicant Emergency Management Division having been responsible for the regional 800 megahertz emergency radio communications project since before 1990, was aware of alternative structures and chose the guyed design as preferable to the more massive, self-supporting structure. Applicant EMD was similarly aware of alternative surface treatments and chose the anodized gray steel as appropriate for Puget Sound skies. In addition, the Department considered a variety of alternative tower locations, seven altogether, which are indicated by location in exhibit no. 20. These alternative locations are described in exhibit no. 15. Also, exhibit nos. 15 through 17, and 19 through 21, demonstrate the Applicant's on-going awareness of the potential impact upon the surrounding neighborhood, and alternative approaches, such as moving the standard landscape screen to a more effective location, such as considering noise attenuation alternatives, and so on. The overall, long-term development of the regional 800 megahertz program in general, and this Ring Hill facility in particular, demonstrates a constant flexibility resulting in previously unanticipated alternatives in order to select an effective well mitigated location for the tower. The Applicant argues that this analysis or evaluation is not sufficiently comprehensive, or detailed or documented based upon RCW 43.21C.030(2)(e).

13. Conclusions Adopted As Necessary. Any portion of any of the conclusions below which may be construed as a finding is incorporated here by reference.

## CONCLUSIONS:

1. For failure to appear, the Towslee appeal will be dismissed.
2. Appellant Saybrook correctly reads RCW 43.21.C.030(2)(e). It requires the proposing public agency to consider alternatives, particularly when there are "unresolved conflicts" regarding resources. However, this rule is not so rigorous or resolute as Appellant Saybrook would suggest, for the following reasons:
  - A. The State Department of Ecology has adopted no rules which implement this statutory requirement. Thus, the method and standards of implementation remain considerably more vague than most of the rest of the law.
  - B. The case law is not as conclusive as Appellant Saybrook's two selected cases would suggest. Putting aside the fact that Fifth Circuit Federal case law is not directly operative here, we must acknowledge that a comprehensive review of the Federal case law will suggest that, although the Federal courts agree with Appellant Saybrook in general

principle, there is no agreement regarding how broadly or strictly the alternatives analysis must be implemented.

- C. There is no Washington State case law interpreting RCW 43.21C.030(2)(e). Even though the language in RCW 43.21C.030(2)(e) is identical to the corresponding provision contained in NEPA, it does not necessarily follow that a Washington State court, in a Washington State SEPA context, would necessarily reach the identical conclusion of a Fifth Circuit New York Federal court.
- D. There are no County rules addressing this SEPA provision, either.

Considering the vagueness, lack of rules, and lack of consistent guiding court interpretation, we cannot impose any particular structure of implementation requirements. Examining the record in this particular case, it cannot be concluded that the Applicant woke up one morning to say, "I think I'll build a radio transmission tower next to Saybrook." Instead, the record shows that Applicant Emergency Management Division developed a comprehensive locational plan over a long period of time, taking into consideration a broad variety of both publicly and privately owned sites for various towers, including the instant one. See, for instance, pages 4 through 6, exhibit nos. 15 and 16, as well as exhibit nos. 17, 20 and 21. In addition, the Applicant/Proponent through testimony obviously considered various on-site alternatives such as tower height, structural design, color, landscaping and so on. This alternative analysis may not meet the standard set by the King County Solid Waste Division when it prepared its March 1997 "Site Selection Report for the Vashon Island Transfer/Recycling Station<sup>2</sup>," but the Applicant/Proponent's alternative analysis certainly occurred. However casual it might have been, however copiously detailed and documented it might not have been, the evidence and testimony clearly demonstrates that, indeed, the alternatives analysis occurred. In the absence of adopted applicable rules and standards, I will make no conclusion here regarding the adequacy of that review, other than to note that there is enough evidence to conclude that the Applicant/Proponent has complied with the probable reasonable minimum requirement established by RCW 43.21C.030(2)(e).

3. As noted in Finding No. 5A, above, the burden of proof falls on the Appellant in a threshold determination appeal. Considering the preponderance of the evidence, the Appellant has not success-fully borne that burden in this case. Considering the above findings of fact and the entire hearing record, it must be concluded that the Division's threshold determination in this matter is not clearly erroneous and therefore cannot be reversed.

The presentation of issues, questions and concerns is not sufficient to overturn a threshold determination. Rather, the determination (and the appeal review of that determination) must be based upon the preponderance of the evidence. The preponderance of the evidence in this case supports the Division's determination.

4. The aesthetic issues raised by the Appellant are valid reasons for concern. However, they do not approach the magnitude requisite for a Determination of Significance.

5. In addition, the following conclusions apply:

- A. There is no indication in the record that the Division erred in its procedures as it came to its threshold declaration of non-significance. Rather, the Appellant differs with the Division's assessment of impacts or the probability of potentially adverse impacts.

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<sup>2</sup> The site selection report referenced here is not contained in this hearing record. Nor is any aspect of this decision based upon any aspect of the cited Solid Waste Division report. This site selection report is mentioned here only to provide the Department and the Applicant something to consider when discussing how to implement RCW 43.21C.030(2)(e) in the future.

Speculation with respect to potential impacts cannot prove a probable significant impact that requires the responsible agency to be overruled or to alter its initial determination.

- B. Although the Appellant argues that the information on which the Division based its determination was insufficient, there is no adequate demonstration that the information on which the Division based its determination is actually erroneous.
  - C. There is a substantial amount of information in the record regarding the various impacts which have been asserted by the Appellant. The Division has not been unaware of these issues and has investigated (and reinvestigated) them, but has arrived at conclusions which differ from the Appellant's. The Division, having had access to the variety of issues and points of view and information expressed by the Appellant and others, maintains its original determination of non-significance. The Division's judgment in this case must be given substantial weight.
  - D. In view of the entire record as submitted and in view of the State Environmental Policy Act, the Division's decision is not clearly erroneous and is supported by the evidence.
6. Having reviewed the entire hearing record, these additional conclusions are entered:
- A. The communications facility, including appurtenances, is designed in a manner which is compatible with the character and appearance of the existing development in the vicinity of the subject property.
  - B. The location, size and height of the radio transmission tower and appurtenant structures, as well as fences and berms and screening vegetation do not hinder neighborhood circulation or discourage the permitted development or use of neighboring properties.
  - C. The radio transmission tower and appurtenant facilities are designed in a manner which is compatible with the physical characteristics of the subject property. No reduction of standards has been requested. Therefore, impacts will be mitigated in a manner equal to or greater than the standards contained in KCC Title 21A.
  - D. The conditional use is not in conflict with the health and safety of the community.
  - E. The record contains no evidence that pedestrian and vehicular traffic associated with the use will be hazardous or conflict with existing or anticipated traffic in the neighborhood.
  - F. The record contains no evidence that the conditional use will not be supported by adequate public facilities or services; or that public services to the surrounding area will be adversely effected.

For all of these reasons the conditional use permit will be denied and the responsible official's decision confirmed.

7. Any of the preceding finding nos. 1 through 12 which may be construed as a conclusion are hereby adopted as such.

DECISION:



- A. The Towslee appeal is DISMISSED. See conclusion no. 1, above.
- B. The Saybrook SEPA appeal is DENIED. See conclusions 2 and 3, above.
- C. The Saybrook CUP appeal is DENIED. See conclusion no. 4, above.

ORDERED this 23<sup>rd</sup> day of December, 1997.

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R. S. Titus, Deputy  
King County Hearing Examiner

TRANSMITTED the 23<sup>rd</sup> day of December, 1997, via mail, to the parties and interested persons indicated on Attachment A.

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision

MINUTES OF THE DECEMBER 11, 1997 COMBINED SEPA THRESHOLD DETERMINATION APPEAL AND CONDITIONAL USE PERMIT DECISION APPEAL PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L97AC005 – RING HILL TELECOMMUNICATION FACILITY:

R. S. Titus was the Hearing Examiner in this matter. Participating at the hearing were Joe Blaschka, Anthony Bontrager, Bob Fong, Steve Greso, David Mann/Attorney At Law, Lanny Michael, Kevin Kearns/ King County Emergency Management Division, and Angelica Velasquez/DDES-LUSD-SEPA Section.

The following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 King County Department of Development and Environmental Services (DDES) staff report prepared for the December 11, 1997 combined SEPA Threshold Determination Appeal and Conditional Use Permit Decision Appeal hearing on file no. L97AC005- Ring Hill Telecommunications Facility
- Exhibit No. 2 DDES *Determination of Nonsignificance for the Ring Hill Telecommunications Facility – L97AC005*, date issued July 1, 1997
- Exhibit No. 3 DDES, Land Use Services Division (LUSD), SEPA Section *SEPA Checklist*, date submitted January 28, 1997, signed by Michael Aippersbach
- Exhibit No. 4 Letter, dated July 9, 1997, from David S. Mann/Bricklin & Gendler/Attorneys-At-Law, to DDES, re: Saybrook Homeowners Association appeal of L97AC005/Ring Hill Telecommunication Facility determination of nonsignificance and current use permit decision, with attached appeal statement
- Exhibit No. 5 Letter, dated July 21, 1997, from Daniel and Karen Towslee, to DDES, re: appeal of L97AC005/Ring Hill Telecommunication Facility determination of nonsignificance and current use permit decision, containing statement of appeal
- Exhibit No. 6 4 sheets (stapled), Ring Hill Telecommunication Facility project plans, dated December 24, 1996: vicinity map, site plan, landscape plan, building plan, and tower plan.
- Exhibit No. 7 Combined SEPA and CUP files no. L97AC005

- Exhibit No. 8 2 aerial photos of site vicinity
- Exhibit No. 9 7 photographs, (helium balloon indicates height of proposed tower), each photo location and date document and back of photo
- Exhibit No. 10 2 site photo, one with tower-height-balloon/one without
- Exhibit No. 11 Computer generated tower superimposed onto photo of proposed site (without proposed landscaping) submitted by appellant
- Exhibit No. 12 Computer generated tower superimposed onto colored printout of proposed site (without proposed landscaping) submitted by applicant, dated November 20, 1997, by Bob Fong & Associates
- Exhibit No. 13 Computer generated tower superimposed onto colored printout of proposed site (with proposed addition of trees and landscaping) submitted by applicant, dated November 20, 1997, by Bob Fong & Associates
- Exhibit No. 14 Letter, dated December 10, 1997, from Jerry Lilly/JGL Acoustics, Inc/noise consultant, to David Mann/Bricklin & Gendler, re: Saybrook Homeowners Association community noise evaluation
- Exhibit No. 15 Letter, dated November 12, 1997, from Kevin Kearns/King County Emergency Management Division, to R. S. Titus/KC Hearing Examiner, re: submission of evidence and witness lists (L97AC005), dated received November 18, 1997
- Exhibit No. 16 Kevin Kearns/King County Emergency Management Division, *Report of the Conceptual Design Review Workgroup of the King County Regional 800 MHz Task Force*, dated October 3, 1990
- Exhibit No. 17 Ronald Vegemast Engineering, Inc., *Evaluation of Mobile Radio Systems* report to King County, dated August 15, 1991
- Exhibit No. 18 Copy of ordinance no. 10464
- Exhibit No. 19 King County Emergency Management Division, *Information Sheet King County Regional 800 MHz Emergency Radio Communication Sheet*, dated "Updated: October 1997"
- Exhibit No. 20 Map section showing north-central King County, with 7 small blue dots indicating alternative sites
- Exhibit No. 21 Letter, dated November 26, 1997, from Kevin Kearns/King County Emergency Management Division, to R. S. Titus/KC Hearing Examiner, re: submission of evidence and witness lists (L97AC005), dated received December 2, 1997, with attached geotechnical report
- Exhibit No. 22 2 line-of-sight comparison drawings, created and submitted by David Mann on December 11, 1997
- Exhibit No. 23 DDES, *Conditional Use Permit Application REPORT DECISION*, dated July 8, 1997
- Exhibit No. 24 DDES, *Conditional Use Permit Application*, dated received January 31, 1997, with attachments

attachment

RST:vam

SEPA\l97ac005 Ring Hill Telecommunication Facility report